Supreme Court, U.S.
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No. OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

JABARI ZAKIYA f/k/a DOUGLAS ROSS,
Petitioner,

v.

UNITED STATES OF AMERICA

Petition for Writ of Certiorari To the United State Court of Appeals for the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

Pro Se.
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3 pgs

QUESTIONS PRESENTED

1. Did the circuit court err in not applying all relevant caselaw, specifically the *Cheek* decision, in affirming the verdict?

2. Did the circuit court deny the defendant's 6th Amendment right to assistance of counsel by removing the Federal Public Defender, at the last minute, after it had ordered that office appointed as counsel for the purpose of the appeal?

3. Did the district court err by prohibiting the defendant from calling and questioning his own witnesses, at his discretion, to establish the defendant's state of mind in order to negate willfulness?

4. Did the district court err by allowing the government to proceed without presenting testimony or other evidence to establish the defendant's state of mind in order to prove his alleged willfulness and the other essential elements of the charges?

5. Did the district court err by prohibiting the defendant from attacking the evidence and testimony of government witnesses, in a manner similar to that allowed to other criminal cases, to raise reasonable doubt in the minds of the jury?

6. Did the district court err in not recognizing the violation of the defendant's 5th Amendment due process rights stemming from actions taken by the government prior to trial?

7. Did the district court err by allowing the prosecution to prejudice the jury by using testimony and other evidence which occurred outside the statutory time limit of the alleged charges?

8. Did the district court err by allowing the government to present physical evidence without corroborating testimony?

9. Did the district court violate the defendant's first Amendment right by extending his sentence simply for exercising his right of free speech and association, or in the alternative, did the district court err by imposing sentence for something the defendant was not charged with, tried for, or found guilty of by a jury?

10. Did the district court err in discriminating against the defendant by taking arbitrary actions to remove and deny persons of African descent from serving on the jury?

11. Did the circuit court err in not recognizing the deficiency of the district court record, even though it was notified that the record was deficient?

12. Did the district err by ordering trial exhibits to be returned prior to the appeal process?

13. Did the district court err in impeding the Federal Public Defender's attempt to obtain the trial transcript?

14. Did the district court err by allowing the prosecution to prejudice the jury by using hearsay witnesses, whose testimonies provided no facts relevant to establishing the essential elements of the alleged charges.

15. Did the district court err by allowing the signing of a W-4 form to constitute an "affirmative act" in regards to willful tax evasion when "withholding" can not affect the assessment of a tax liability, or a deficiency?

16. Did the district court err by prejudicing the jury when it used a jury instruction purporting facts not established at trial, submitted by the government at the last minute, and without giving the defendant an opportunity for prior review?

PARTY TO THE PROCEEDINGS

Petitioner was employed with NASA Goddard Space Flight Center (GSFC) in Greenbelt, Maryland from May of 1979 to September of 1994, when he was removed from service by his employer as a result of this case. He has a B.S. from Cornell Univ. and M.S. from GA. Tech in electrical engineering. He was employed as a GS-13 electrical engineer, concentrating in digital systems and software design.

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OPINION BELOW

The opinion, dated August 4, 1994, of the Court of Appeals, Appendix A, and the denial of defendant's Petition for Rehearing, dated September 16, 1994, Appendix B, are unpublished.

JURISDICTION

The decision of the United States Court of Appeals for the Fourth Circuit was filed on August 4, 1994. A denial for a petition for rehearing was filed on September 16, 1994. This petition is, accordingly, filed within the time allowed by law. The jurisdiction of this Court is invoked pursuant to 28 U.S.C., § 1254(1).

STATEMENT OF CASE

In March of 1984 petitioner came to learn and believe, through reading various books, doing direct research, and after making inquiries with the IRS, that he was not required by law to have wages withheld from his pay, or required to file any tax returns.

In March of 1988, after four years of continuous research into the field of taxes, petitioner made his first public appearance on radio to discuss the "income tax system" and to present the results of his research. Since that initial appearance, petitioner has made repeated presentations on radio and TV shows, some nationally, but primarily in the Washington, DC area. He also gave seminars, where he presented his views and the findings of his research on the tax system.

In 1989, petitioner sent a letter to NASA payroll requesting that they no longer deduct FICA payments from his wages. When NASA payroll did not comply with his request petitioner sought an opinion from GSFC Chief Counsel to resolve the issue.

After repeated attempts to schedule a meeting, GSFC Chief Counsel reluctantly met with petitioner. GSFC Chief Counsel, however, would not give verbal, or written answers, to any of petitioner's questions, nor engage petitioner in a discussion of the issues.

After the meeting, GSFC Chief Counsel, unbeknownst to petitioner, contacted the IRS Chief Counsel Office. It was later learned that this breach of confidentiality with GSFC Chief Counsel was instrumental in triggering an investigation by the IRS.

In March of 1990, an article appeared in the Washington Post featuring petitioner and his views on taxes. Following that, in May of 1990, two agents from the IRS Criminal Investigation Division (CID) came to NASA GSFC to "interview" petitioner.

Petitioner, after meeting with the CID agents, began writing the CID agents seeking information regarding the nature of any potential liabilities, potential charges, and his actions, which warranted investigation, as allowed by 26 C.F.R. § 601.201(a)(1).

Petitioner presented, to the CID agent, his IRS Individual Master File which indicated petitioner had no tax liability for the years under investigation. The CID agent blatantly refused to establish how petitioner could be subject to a criminal investigation when he had not even been notified of any civil violations, never received a notice of deficiency, per Internal Revenue Code (IRC) § 6303, nor received requested records of assessments, per IRC § 6203.

In support of the petitioner's contentions that he has no liability, he has not received any notice of assessments or deficiencies, nor has any of his property been subject to any lien, levy or any other civil collection action.

In a letter, dated August 30, 1990 [Def. Ex. 5], petitioner wrote to the CID agent requesting a criminal investigation hearing per 26 C.F.R. § 601.107(b)(2) [Def. Ex. 5A]. In a response, dated September 12, 1990, from the CID agent, and a letter, dated December 5, 1990, [Def. Ex. 19] from an IRS Senior attorney, it was affirmed that petitioner would be afforded a conference if a recommendation for prosecution was made.

In December of 1991 petitioner was notified by CID that the agent had recommended that he be prosecuted for attempted evasion of income taxes for the tax years 1987, 1988, and 1989.

Petitioner's attorney then wrote the CID case agent, and Senior attorney, on January 21 and February 25, of 1992 requesting a conference. Petitioner also wrote on March 16, 1992 [Def. Ex. 21] requesting, again, that a conference be granted.

In a letter, dated March 23, 1992, [Def. Ex. 22] from the IRS Senior attorney, petitioner was informed he would not be afforded a conference, and that 26 CFR § 601.107(b)(2) did not relate to his office.

Upon notification of the recommendation for criminal prosecution, petitioner, and his attorney, made repeated attempts through the Justice Department, to determine who was assigned the case and to arrange pre-indictment hearings. No meetings were ever established. Petitioner, and his attorney, also wrote the Justice Department and requested notification in the event of grand jury

hearings. Neither petitioner, nor his attorney, were ever notified of such occurrences.

On April 15, 1993, petitioner was notified by his attorney that he had been indicted of one count of willful tax evasion, per IRC § 7201 for 1987, and three counts of willful failure to file tax returns, per IRC § 7203 for 1987, 1988, and 1989, in the U.S. District Court for the District of Maryland in Baltimore, Maryland.

Petitioner appeared before a federal magistrate in *propria persona* to inform the magistrate he could not ascertain from the indictment the specific statutory violations he was charged with, and that he had a motion before the court to establish these factual issues and to determine if the court had legal jurisdiction over petitioner's person.

The magistrate, after conceding some vagueness in the indictment, granted petitioner's request for a postponement until the district court ruled. Another appearance was scheduled.

At the second appearance the magistrate ordered a plea of "not guilty" entered over petitioner's continuous explanations that he was not refusing, but was unable to, plea until the district court judge ruled on his motion questioning jurisdiction and vagueness of the indictment.

When the plea of not guilty was entered, petitioner was immediately ordered to appear before the district court judge. With an "escort" of marshals, petitioner "voluntarily" appeared before the judge. The judge set a trial schedule and eventually appointed the FPD as standby counsel in June 1993.

Trial commenced Monday, October 18, 1993 before the District Court for the District of Maryland. During the eleven day trial the district court committed many errors and violations of procedures, rules, and petitioner's rights.

Petitioner was continually denied the opportunity to sufficiently cross-examine government witnesses, and was prohibited from calling and fully questioning his own witnesses, and from present relevant testimony and other evidence.

During the trial the district court also took arbitrary actions to remove and deny persons of African descent to sit as jurors, and, in addition, failed to preserve the record for the circuit court to review.

On Friday, October 29, 1993, closing statements were given, and about 2:30 PM the jury was released to start deliberations. At about 5 PM **the jury requested a rereading of the willfulness instruction and recessed**. At about 6 PM **the jury, again, requested clarification on the willfulness instruction**, and asked that the instruction be written out. The judge refused to given a written instruction, and gave another oral version of the instruction, which seemed more confusing than the first version.

After the judge orally presented the jury instruction for willfulness on the second request, the jury was released for the weekend. On Monday, November 1, 1993 the jury returned a verdict of guilty on all four counts.

Even though petitioner had no prior criminal record, on February 18, 1994, petitioner was sentenced to a recommended maximum sentence of 16 months, and a $25,000 fine.

In March of 1994 the 4th Circuit ordered the FPD appointed counsel to represent petitioner for the appeal. In May, at virtually the last minute, the circuit court ordered the FPD relieved from representing petitioner. Petitioner, with no other reasonable alternatives, preceded *pro se*.

On June 6, 1994, *pro se* petitioner filed an informal brief with the circuit court. In an unpublished opinion, dated August 4, 1994, the circuit court affirmed the district court verdict.

Subsequently Petitioner secured counsel who was willing to represent him in a manner consistent with his beliefs and understanding. Through counsel, petitioner filed, on August 17, 1994, a Petition For Rehearing with Suggestion for Rehearing In Banc. The 4th Circuit denied the Petition, with judgment filed September 16, 1994.

REASONS FOR GRANTING THE WRIT

This case raises important Constitutional issues which this court should review and address. **The 4th Circuit and the district court clearly violated the *Cheek* holdings** established by this Court, thus placing the 4th Circuit and the district court **in conflict** with *Cheek*, and in conflict with conforming rulings of other circuits.

Petitioner was also denied, through various actions of the government and the courts, the protection of his **1st Amendment rights** of free speech and association, his **5th Amendment due process rights**, and his **6th Amendment rights** to present his own witnesses and testimony, confront opposing witnesses, and for assistance of counsel.

Additional errors of the court include the presentation of **prejudicial jury instructions** and **racially discriminatory actions** which excluded African citizens from sitting on the jury.

Errors of 4th Circuit

1. The 4th Circuit Opinion is Inconsistent with the *Cheek* Decision

The **circuit court makes virtually the same error** in raising the issue of the content of petitioner's defense **that was ruled upon in *Cheek v. United States***, 498 U.S. 192, 111 S.Ct. 604, (1991).

The *Cheek* court ruled that a good faith misunderstanding of the law or a good faith belief that one is not violating the law negates willfulness, whether or not the claimed belief is objectively unreasonable. Statutory willfulness, which protects citizens from prosecution for innocent mistakes made due to the complexity of the tax laws, is the voluntary, intentional violation of a known legal duty.

Thus, if a jury credits a defendant's assertions, the government will not have carried its burden to prove willfulness, even if the district court deems such beliefs unreasonable.

The opinion regarding petitioner's alleged use of voluntariness of the tax laws as "not a defense to those charges" characterizes petitioner's belief from what is normally a factual inquiry, to be judged by a jury, into

a legal one, thus ignoring petitioner's right to present testimony to a jury for its consideration.

The opinion thus errors in the same manner *Cheek* eloquently ruled against, an error petitioner raised in his informal appeal. The appellate court clearly ignores *Cheek* in dismissing petitioner's right to present facts to a jury for their evaluation, and not the court's, in determining the essential element of willfulness.

Petitioner filed a Renewed Motion For Judgment of Acquittal, which cited the misapplication of *Cheek*. It documented how petitioner was denied the following rights and opportunities:

A. the opportunity to present sections of the IRC, books excerpts, court decisions;

B. his right to present, to the jury, the contents of his own copyrighted paper concerning the current tax system and his book manuscript concerning an alternative tax system;

C. the opportunity to question his own witness, who was helping with the editing and marketing of his manuscript, about his state of mind as to why he wrote his paper, and his efforts to get his book published; and

D. the right to compel a witness to testify through a subpoena, or to allow an affidavit from this witness to be presented to the jury for their consideration.

Therefore, the appellate court should have had in the record this motion which details the trial court's denial of petitioner's right to present information to the jury to establish his state of mind to negate willfulness, in violation of *Cheek*.

2. 4th Circuit Opinion Conflicts with the 6th and 9th Circuits

The **4th Circuit's** unpublished **opinion is clearly in conflict with** the ruling of **other circuits** regarding these exact case issues.

In *United States v. Powell*, 936 F.2d 1056 (9th Cir 1991) the wife and husband defendants convictions for willful failure to file tax returns were overturned by the 9th Circuit for violating *Cheek*.

The Powells, who were *pro se*, had been prevented from presenting evidence at trial, specifically the language of 26 U.S.C. § 6020(b). **The 9th Circuit found prejudicial error in the trial court's exclusion of just this one section**, because such exclusions had the effect of forbidding the jury to consider evidence that might negate willfulness.

The 9th Circuit also held, the general rule that the district court does not abuse its discretion when it does not allow a defendant to present law to the jury, must give way when a defendant's 6th Amendment rights hinge on admission of the law. The statute, which the Powells had relied upon to form their belief that the tax system did not require them to file an income tax return, was relevant to, and probative of, the issue of willfulness. This was one of the grounds for reversal.

Similarly, in *United States v. Gaumer*, 972 F.2d 723 (6th Cir 1992), the 6th Circuit held that Gaumer, also a *pro se* litigant, was entitled to admit into evidence legal materials which he claimed supported his beliefs that he was not required to file income tax returns, evidence which was relevant to the issue of willfulness.

The 6th Circuit specifically held that the trial court was not required to permit into evidence exhibits comprising hundreds of pages. However, at a minimum, Gaumer should have been allowed to read relevant excerpts to the jury. That is, Gaumer should have been allowed to present the contents of the exhibits to the jury to the extent that the material was relevant to establishing a basis for his state of mind.

Thus, *Cheek* is controlling, and two other circuits have followed suit. The 4th Circuit's unpublished opinion not only disregards the holdings in *Cheek*, and asserts an erroneous basis of analysis in regards to petitioner's 6th Amendment right to present a defense that is to be ultimately judged by the jury.

3. The 4th Circuit Opinion Errors in Stating the Conviction

The appellate opinion errs in stating petitioner was convicted of filing a false withholding exemption certificate in violation of 26 U.S.C. § 7205(a) and (b). (Appendix E)

The original indictment mistakenly cited that charge in its caption, but the court docket of May 12, 1993 clearly records the amending of the indictment by the government to strike the reference of that charge from the indictment and to change the name of petitioner to Jabari Zakiya. Petitioner was never indicted, tried or sentenced on that charge.

The appeals court statement reflects negligence in their review of the factual matters in the record, and a transmittal by the district court of an incomplete or false record which has prejudiced petitioner.

4. The 4th Circuit Opinion Errors in Stating Defendant's Beliefs

The circuit court errs in stating petitioner's beliefs, ignores his presumption of innocence, and 6th Amendment protected rights.

The opinion stated petitioner "admits to all of the conduct establishing the criminal offenses with which he was charged ..." This is error, in complete opposition to petitioner's position at trial, and can in no way be inferred, let alone established, by a review of the court record.

At no time did petitioner admit to any of the essential elements. A complete record would establish that petitioner was adamant in not making stipulations of any kind.

It is error that the court found that petitioner admitted conduct establishing violations of § 7205 when he was never indicted or tried on that charge. (Appendix E)

The opinion continues to state, "...his beliefs regarding the voluntariness or legality of the federal income tax system are not a defense to those charges."

Again, the appeals court is in error in characterizing the nature of petitioner's defense thereby placing a nonexistent burden upon petitioner to prove his innocence, in violation of the Constitution.

An accused is innocent until proven guilty, and has no requirement to testify. It is the government's burden to establish guilt beyond a reasonable doubt, not a defendant's to establish innocence. In the absence of affirmative proof of guilt, a defendant is entitled to a not-guilty verdict, even if he presents no evidence of his innocence.

The reasoning stated by the Court thus violates petitioner's 6th Amendment protected rights, ignores petitioner's presumption of innocence during the trial, and unburdens the government from its requirement to establish at trial guilt beyond a reasonable doubt.

5. Insufficiency of Record Presented to the Circuit Court

It was error for the 4th Circuit to dispense with oral arguments on the grounds that "the facts and legal contentions are adequately presented in the materials before the Court and argument would not aid the decisional process." A review of the facts concerning this case does not substantiate that finding.

The circuit court did not have the benefit of the trial transcript to analyze in conjunction with appellant's informal brief. The circuit court was also without the benefit of the trial exhibits, as the district court ordered all exhibits returned to the parties at the end of the trial. Therefore, it is factually inaccurate that the circuit court had an adequate record.

The trial judge's orders directly prevented the formation and transmittal of a complete record for the circuit court to review. Oral arguments, under these conditions, would be virtually required to establish and present to the circuit court missing pieces of the trial record which were unavailable in the record sent by the lower court.

Because of the foregoing, a full record of the trial was not developed and presented to the circuit court. Without a review of the full record the circuit court could not have evaluated the evidence

and facts on which key issues reside. Petitioner had thereby been prejudiced.

6. Denial of Assistance of Counsel

Petitioner's 6th Amendment right to assistance of counsel was denied by the circuit court for the purpose of filing an appeal.

Petitioner proceeded *pro se* at trial, with the FPD appointed by the district court as standby counsel. After the trial, the circuit court ordered the FPD appointed to represent petitioner for appeal.

The FPD, as counsel, submitted an order for the preparation of the trial transcript, which was denied by the trial judge. Subsequently, the FPD inquired of the circuit court for guidance as to how to proceed to represent petitioner under these exigent circumstances. The circuit court, thereafter, issued an order in May 1994 relieving the FPD as counsel.

Petitioner, stripped of counsel, proceeded *pro se* while attempting to secure competent counsel. With encroaching time periods eminent, and unable to secure competent counsel on short notice, petitioner filed an informal brief, without benefit of a trial transcript or all court exhibits.

The manner and timing behind the circuit court's order removing the FPD as previously designated counsel, violated petitioner's 6th Amendment right to assistance of counsel at all stages of proceedings, a principle upheld in *Gideon v. Wainwright*, 372 U.S. 335 (1963) and *Powell v. Alabama*, 287 U.S. 45 (1932).

Errors of the District Court

7. Actions Constituting Racial Discrimination of Jury Composition

The trial court actions excluded jurors of African descent from sitting on the jury, in a racially discriminatory manner in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986) and its progeny.

One of the three African jurors (all female), was struck from the jury when, it was reported, she called the court about 8 AM on the Monday of the second week of the trial and stated that she could not be in court at the appointed time, 10 AM, because her roommate's daughter had been missing over the weekend. The AUSA moved the court to replace her. The trial judge struck the juror against petitioner's objections. She was replaced with a white female, the first of two alternates.

Petitioner called that juror later that night and learned that she had called the court about 9:30 AM and informed them the problem had been resolved and that she could report, but it would be after 10 AM, since she lived about 90 minutes away. She stated she wanted to serve, since she had never been on a jury, and it was interesting.

Thus, the court clerk, and judge's chambers, should have had this information before 10 AM. At most, there only needed to be a delay in the trial starting time to allow the juror time to get to court. No accommodation was given to allow this juror to continue to sit.

This is contrasted against the events of two days later. The judge, on Tuesday, proclaimed the jury would be held late into the evening, till 8 or 9 PM, in order to finish the trial before the next week. He specifically stated he would allow no interruptions in the trial which would cause any delay in its completion.

The day after this proclamation, Wednesday, a white juror, after a short recess, could not be found on reconvening about 5 PM. It was later determined he was seen leaving the court building and left no word of his whereabouts or when he would return.

At about 5:30 PM petitioner moved the court to sit the remaining alternate juror, who was an African male. The government objected, citing this would exhaust the alternates. Petitioner immediately cited the judge's prior day proclamation allowing no interruptions, his prior action, and the fact this was delaying petitioner's defense.

After waiting another 15 minutes, the judge postponed the trial to the next day, even though the juror was still missing, and without seating the African male alternate juror as a replacement. This clearly violated the judge's own prior day explicit proclamation.

This act incontrovertibly excluded the Black male alternate from the jury, composed at the time of 10 Whites and 2 Black women. There is no logical or procedural reason why this alternate should not have been seated, except to deny and limit composition of the jury from another member of petitioner's race.

This judge's action violated his own stated policy, created an unnecessary delay in the trial, and violated the Supreme Court's clear mandates established in *Batson v. Kentucky*, 476 U.S. 79 (1986), et al, against racially discriminatory exclusionary jury practices.

8. Violations of Defendant's 5th Amendment Due Process Rights

Petitioner was continually and consistently denied his due process rights at various junctions, and through various forums, in this case.

Example 1.

Petitioner continually wrote the CID agent to set up meetings to get information regarding the nature of the alleged criminal behavior under investigation. Petitioner wrote the CID agent [Def. Ex. 5] requesting a district criminal investigation conference per 26 CFR § 601.107(b)(2). A Senior attorney responded [Def. Ex. 19] "...your case will be reviewed by this office before a decision is made whether to refer the case to the Department of Justice. During our review, you will be afforded a conference." (Emphasis added.) When the case was recommended to Justice, the CID responded [Def. Ex. 22], "Although my previous letter advised that our District Counsel office would afford you a conference, it was subsequently determined that a conference would not be offered." (Emphasis added.) The regulation is clear, a conference can be requested by either party. The government's refusal to provide petitioner a conference denied petitioner notice. He was not afforded the opportunity to acquire relevant information in regards to the nature of the facts, figures, and other essential elements of the proposed criminal charges against him. Said denials violated petitioner's due process rights and negated access to administrative remedies. These denials also violate the spirit, and law, of the Taxpayer's Bill of Right's of 1988, which was passed to protect citizens from unwarranted IRS conduct. The district

court erred in not finding the IRS acted to deny due process, and/or access to administrative remedies.

Example 2.

Defendant, and his attorney, continually attempted to determine when a grand jury would be convened. They wrote the Justice Department specifically requesting such notification. A grand jury was convened, and returned an indictment against petitioner, but neither petitioner nor his attorney were notified. The government's failure to respond to petitioner, and his attorney, violated his due process and 6th Amendment rights. Petitioner has obviously been irrefutably injured by his denial to address the grand jury, thus depriving the grand jury of his testimony, which could have negated a return of an indictment..

Example 3.

The district court denied defendant's motion for a Bill of Particulars, even though the Federal Magistrate who presided over the "arraignment" explicitly acknowledged the vagueness of the indictment, which was subsequently amended **three times**, and stated "... you may file a motion for a bill of particulars to require the government to be more specific on the charges." This Court has ruled in *Russel v. U.S.*, 369 U.S. 749 (1962) that an invalid indictment can reverse a conviction. The government should have been required to remove the vagueness of the charges, highlighted by the circuit court's misstatement of the conviction, and because petitioner was denied access to the grand jury, or its records. The district court clearly erred in not granting petitioner's motion for a Bill of Particulars to eliminate acknowledged vagueness of the charges.

Example 4.

The district court allowed the government to raise issues and present testimony regarding events which occurred outside the time frame of the charges, i.e. outside the period 1987--1989. The government was allowed, for example, to raise issues of petitioner's political interest in DC statehood and reparations for Africans in America. It was never shown how these activities could have affected, **retroactively**, petitioner's state of mind, or the other essential elements of the charges, in the 1987--1989 period. Petitioner was also never indicted of these activities constituting criminal offenses, yet they were used

to prejudice the jury. This constitutes a denial of due process since these issues were totally irrelevant and raised only to bias the jury.

9. Violations of Defendant's 6th Amendment Rights

The consistent denial of the opportunity for petitioner to sufficiently cross-examine government witnesses to raise reasonable doubt to their testimony, and evidence presented, constituted a violation of petitioner's 6th Amendment right to confront and question witnesses against him.

The government presented witnesses to provide testimony and introduce evidence to allegedly establish facts to prove to the jury each essential element of each charge -- beyond a reasonable doubt.

A defendant has a 6th Amendment protected right to confront and question witnesses. Government witness testimony, therefore, must stand up to the scrutiny of cross-examination, to prove and sustain beyond a reasonable doubt the essential elements of each charge.

Failure of the government to produce evidence to prove each essential element (Appendix D) of each charge constitutes grounds for dismissal for lack of sufficient evidence, if any one element is not proved. *United Sates v. Bass*, 784 F.2d 1282 (5th Cir 1986).

The record is clear that the trial judge continually denied petitioner the opportunity to sufficiently cross-examine government witnesses in order to raise reasonable doubt in the minds of the jury with respect to the witnesses' testimony and evidence presented.

Such denials prevented petitioner from cross-examining government witnesses on their knowledge of the Internal Revenue Code, the Internal Revenue Manual, court decisions, internal procedures, and other relevant areas of questioning.

This puts petitioner in the position of being accused of knowingly violating complex tax laws he allegedly understood, without the government witnesses ever having to prove that they knew and

understood these complex tax laws and that they followed required procedures.

In capital offense and drug cases, for example, it would be unquestioned that a defendant could attack government witnesses, including expert witnesses, regarding the accuracy of their testimony, their knowledge of facts, and adherence to procedures.

Failure of the district court to allow petitioner to sufficiently cross-examine government witnesses to raise reasonable doubt to their testimony, and evidence presented, constituted a denial of petitioner's 6th Amendment right to confront and question witnesses against him.

In addition, the district court erred in allowing the government to admit into evidence purported Certificates of Assessments, supposedly created in 1993 by the IRS Philadelphia Service Center without requiring the government to present a witness to testify to their authenticity.

This act by the district court, not only denied petitioner his right to confront and question witnesses, it severely prejudiced the jury by not allowing any discussion on what these documents were purported to represent and whether they were accurate in that purported representation.

The record also establishes that **no government witness testified or presented evidence to prove or establish petitioner's state of mind** with respect to either willful tax evasion or willful failure to file a tax return.

Clearly, no IRS witness could testify to the element of willfulness, since no IRS witness knew petitioner, and thus could not directly assess his state of mind. A key government witness who had direct contact with petitioner, NASA GSFC Chief Counsel, was prevented by the trial judge from being cross-examined concerning his on-the-record opinion of petitioner's sincerity with respect to his positions, beliefs and understanding regarding the tax system. **This also clearly violated *Cheek.***

The government even avoided presenting petitioner's own words as evidence against him. There was a voluminous written, audio and video tape record in their possession, through discovery. If there was a "smoking gun" offering direct proof of willfulness, it definitely would have resided in petitioner's own words and writings.

Since the government failed to produce any witnesses or evidence, including petitioner's own words, to establish that petitioner had an intent to violate any tax law, they did not meet their burden of establishing willfulness.

Therefore, the government witnesses were only testifying in an attempt to establish the other essential elements of each charge, which are with respect to willful evasion: 1) establishing a tax deficiency and 2) establishing an affirmative act; and with respect to willful failure to file: 1) proving the defendant was required to file a tax return, and 2) proving that the defendant failed to file.

In order for the government witnesses' testimony to be relevant with respect to essential elements #1 and #2 under each count their testimony must have addressed certain specific facts.

With regards to the essential element #1 of willful failure to file, no government witness presented any evidence to establish the statutory basis, such as IRC § 6011, which would create a requirement for petitioner to file any tax return. Petitioner, as stated, was denied the chance to illicit this information from the IRS witnesses.

If the IRS agents and attorneys did not know the statutory basis which would create a requirement for petitioner to file a tax return, then who should know?

The government also failed to establish essential element #2 of willful failure to file, which would only have relevancy if the first essential element was proven. As *Spies v. U.S.*, 317 U.S. 492 (1943) establishes, not doing something (omissions) does not constitute criminal conduct. Proof that one is subject to a requirement to act must exist in order to prove one "failed" to act. Absent the presentation of evidence, the government clearly has not met that burden.

This Court has already established that a citizen can not be presumed to have a requirement.

> Keeping in mind the well settled rule, that the citizen is exempt from taxation, unless the same is imposed by clear and unequivocal language, and that where the construction of a tax is doubtful, the doubt is to be resolved in favor of those upon whom the tax is sought to be laid. *Spreckels Sugar Refining Co. v. McClain*, 192 U.S. 397 (1904).

With regards to the essential element #1 of tax evasion, no government witness presented any evidence to establish the existence of a tax deficiency for the tax years 1986 and 1987. These are clear requirements per IRC §§ 6303 and 6212.

Also, no evidence was presented, in violation of prior holdings, to establish petitioner was ever sent a notice of deficiency and allowed the opportunity to contest such alleged deficiency in Tax Court or anywhere else, pursuant to IRC § 6213. Caselaw has consistently upheld these statutory provisions. *Bull v. United States*, 295 U.S. 247; *United States v. Zolla*, 724 F.2d 808; *Shapiro v. Secretary of State*, 499 F.2d 527; and even *U.S. v. Good Real Property*, 510 U.S. __ (1993).

Finally, the government presented no evidence to establish essential element #2, an affirmative act, to prove evasion. The allegation of filing a false and fraudulent W-4 can never constitute a basis for an affirmative act under Subtitle A, for the reasons in the following section (#10).

10. Submitting a W-4 Can Not Constitute an Affirmative Act

The district court erred in allowing the W-4 to be admitted into evidence to establish the only alleged affirmative act because it has no effect on determining an "income tax" liability or deficiency.

The government produced a W-4 form signed by petitioner and filed with NASA on January 9, 1987. Petitioner submitted the W-4 only after GSFC payroll called and told him if he wanted to remain Exempt (since 1984) from withholding, he had to complete a new W-4 by February 15, 1987. The government claims the form was fraudulently filed and cited it as the only affirmative act of evasion, necessary to sustain the charge.

"Fraud implies bad faith, intentional wrongdoing and a sinister motive and is never imputed or presumed and a court should not sustain findings of fraud on circumstances which at most create only suspicion." *Davis v. C.I.R.*, 184 F.2d 86.

The government must also present clear and convincing evidence to prove fraud, and show how some portion of the established tax deficiency was created by the fraud. *Toussaint v. C.I.R.*, C.A. 5 1984, 743 F.2d 309.

The government produced no tax return or record of assessment, to prove petitioner had a deficiency for 1986 or 1987. This court has ruled in *Laing v. United States*, 423 U.S. 161 and *Bull, supra*, that a deficiency must first be established before evasion can be charged.

Spies also ruled that **an "affirmative act" must show concealment**, be shown to reduce what would be the true assessment, and **be proven to be done with that specific intent**, versus innocent error or neglect.

Petitioner introduced at trial [Def. Ex. 13] his Individual Master File, **a copy of the IRS's own computer records**, which indicated he had neither a tax liability nor deficiency for 1986, 1987, 1988, or 1989.

Also, liability for employment taxes withheld under IRC § 3402, in Subtitle C, are imposed as requirements upon employers and not employees. This Court has recognized that taxes imposed upon wages under Subtitle C are distinct and separate from the income tax imposed under Subtitle A.

> "Decided cases have made the distinction between wages and income and refused to equate the two in withholding or similar controversies..." *Central Illinois Public Service Co v. U.S.*, 435 U.S. 21, 31 (1978)

Further, 26 C.F.R. § 601.401(a) explicitly states that wages withheld during the year are used as a credit for employees against their anticipated income tax liabilities. "Withholding" has no effect on the assessment of an income tax liability, or a deficiency, and thus can not be cited as a valid affirmative act in regards to income tax evasion.

It is thus clear that "withholding taxes" in relation to a W-4, are imposed on an employer under Subtitle C, and cannot affect a tax imposed under a separate mechanism for Subtitle A, on an individual. These are clearly separate and distinct classes of taxes, as are subtitles B, estate & gift taxes, D, miscellaneous excise taxes, and E, alcohol & tobacco taxes.

Removing the citation of the W-4 as an affirmative act renders the willful evasion charge insufficient for lack of an affirmative act. The district court erred in allowing the W-4 to be admitted into evidence to establish the only alleged affirmative act.

Therefore, the government's IRS witnesses could only present testimony and evidence to prove essential elements #1 and #2 of each count, since no IRS witness could testify to willfulness. If that was not their purpose and effect, **their testimony was irrelevant and prejudicial**, and should not have been allowed.

The government's non-IRS witnesses could never testify to essential elements #1 and #2 of each count, since they had no knowledge of facts, or authority, to make those determinations. Therefore, their purpose could only have been to testify to petitioner's state of mind to establish willfulness; if not, **their testimony was clearly prejudicial and irrelevant**, and should not have been allowed.

Since these witnesses had no relevancy in establishing any essential element of each charge the government **failed** to meet its burden of proof to establish every essential element of every count in order to sustain a verdict of guilty.

If the government can merely allege charges in an indictment and not be required by the district court to produce any evidence to prove the charges, why have trials?

The district court thus erred in not granting petitioner's request for judgment of acquittal, made on three separate occasions, for lack of evidence to sustain the charges alleged.

11. Errors in Sentencing

The trial judge violated petitioner's 1st Amendment right of free speech and due process by sentencing him to additional time for engaging in Constitutionally protected activities.

At sentencing the trial judge essentially made the statement, "If it was left up to him, I would sentence you to 14 months, but because you appeared on radio and TV I will sentence you to the government's recommendation of a maximum of 16 months."

This is an explicit acknowledgment that petitioner was given additional punishment for exercising his 1st Amendment protected right to freedom of speech. Appearing on radio and TV is not a crime! Petitioner was also not charged with those activities as being "crimes." It is a violation of a citizen's Constitutionally protected right to free speech to be punished by a court for exercising that right.

This statement by the judge, along with the prior statements by the AUSA concerning petitioners "influence" on people, highlights the government's motivation to try and punish petitioner not because of alleged "criminal" behavior but because of their concern that petitioner's seminars and radio and TV appearances were effective in providing the American public previously unknown information for them to evaluate and consider regarding the "income tax" system.

This, of course, is exactly why the 1st Amendment is the first one. It allows citizens, not the government, the power to decide what to read, hear, see and consider, without influence and control by the government, whose job is to protect the exercising of all rights.

This question of the government's power to punish citizens for exercising their 1st Amendment rights has been recently ruled on in *City of Ladue v. Gileo*, 512 U.S. __, (1994) and is currently under consideration in *McIntyre v. Ohio Elections Commission*, No. 93-986.

Therefore, the imposition of an additional sentence for petitioner's free speech activities constitute a violation of his 1st Amendment rights. Also, sentencing petitioner for something he was

not indicted of, tried for, or found guilty of by the jury violates his right to due process.

12. Illegal Jury Instructions

The trial judge gave **jury instructions** which **violated *Cheek*, contradicted prior holdings** of this Court, contradicted the government's own evidence, and **ignored and/or conflicted with various statutes**.

The trial judge read, essentially verbatim, a government jury instruction, not made part of their proposed instructions, and which was never reviewed by petitioner. This instruction erred as follows:

a) The instruction stated the IRC establishes "the tax system is not a voluntary system." This contradicts 26 CFR § 601.107(a) and the government's own evidence [Gov. Ex. 16a] wherein an IRS spokesman was quoted, "The current system is described as voluntary. You complete the tax forms, no one tells you what the tax is." This statement also contradicts this Court in *Flora v. U.S.*, 362 U.S. 145, 176 (1960) when it stated, "**Our system of taxation is based upon voluntary assessment and payment, not upon distraint.**" (Emphasis added)

b) The instruction stated "wages are taxable within the meaning of the 16th Amendment" and § 61(a) of the code defines "gross income" derived from all sources, including wages. The word "wages" is not in the 16th Amendment, and § 61(a) makes no reference to "wages" as a source of "gross income."

c) It also stated the Secretary of Treasury is not required to assess taxes on individuals before they are due and owing. Sections 6203 and 6303 clearly cite the statutory requirements placed upon the Secretary with respect to tax assessments and notice.

d) This instruction, however, agrees with petitioner that § 3402 places a requirement on employers, and not employees, but doesn't explain that a failure to withhold can pertain only to

employers, and thus can not be alleged as an affirmative act for willful evasion on an individual for "income taxes."

e) The court also gave a "closing of the eyes" instruction, which alluded to what petitioner should have known. This constitutes a violation of his due process rights as it raises prejudicial speculation of issues not specifically presented at trial.

The way this instruction was presented, and its contents, is so extreme and egregious, it alone constitutes grounds for a mistrial.

Also, the manner in which this jury instruction was presented by the AUSA should be cause for sanctions, and the trial judge's acceptance of it should be cause for judicial review.

CONCLUSION

This case raises important Constitutional issues which this court should review and address. The 4th Circuit and the district court clearly violated the *Cheek* holdings established by this court, thus placing the 4th Circuit and the district court in conflict with *Cheek*, and in conflict with conforming rulings of other circuits.

This case also raises other Constitutional issues with respect to denials of petitioner's 6th Amendment protected right to confront opposing witnesses, to call and question his own witnesses, and to present his own testimony without interference from the district court. The case also raises questions concerning the government's burden to present evidence to prove all the essential elements of each charge.

This case also raises further Constitutional issues with respect to denial of petitioner's 1st Amendment protected rights of free speech and association, and denial of petitioner's 5th Amendment protected right to due process. Additional issues raised concern prejudicial jury instructions, and racially discriminatory jury exclusions by the district court.

For the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit should be granted.

Respectfully submitted,

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